TOWARDS THE ATTENUATION OF HARDSHIP: IS THERE ROOM FOR COMBATANT IMMUNITY IN INTERNAL ARMED CONFLICTS?

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REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188

1. AGENCY USE ONLY *(Leave blank)*	2. REPORT DATE	3. REPORT TYPE AND DATES COVERED
	8.Aug.00	MAJOR REPORT

4. TITLE AND SUBTITLE
TOWARDS THE ATTENUATION OF HARDSHIP: IS THER ROOM FOR COMBATANT IMMUNITY IN INTERNAL ARMED CONFLICTS?

5. FUNDING NUMBERS

6. AUTHOR(S)
MAJ WAGER JAMES B JR

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
JA GENERAL SCHOOL ARMY

8. PERFORMING ORGANIZATION REPORT NUMBER

9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)
THE DEPARTMENT OF THE AIR FORCE
AFIT/CIA, BLDG 125
2950 P STREET
WPAFB OH 45433

10. SPONSORING/MONITORING AGENCY REPORT NUMBER
FY00-270

11. SUPPLEMENTARY NOTES

12a. DISTRIBUTION AVAILABILITY STATEMENT
Unlimited distribution
In Accordance With AFI 35-205/AFIT Sup 1

12b. DISTRIBUTION CODE

13. ABSTRACT *(Maximum 200 words)*

14. SUBJECT TERMS

15. NUMBER OF PAGES
45

16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

"The purpose of international humanitarian law is to regulate hostilities in order to attenuate hardship."[1]

> Within a month, bombs were tearing holes in the few buildings patched in three years of peace. The city was calm, but already emptying of all civilians who could afford to go. Only gunmen and the poor – including thousands of ethnic Russians – were left.
>
> The siege effectively started when Russian troops crossed the Terek River on October 21. The following day five guided missiles fired from North Ossetia ploughed into Grozny's central market, killing at least 137 civilians and fighters.[2]

I. Introduction

Civil war,[3] as with any war, is a bloody enterprise. The same bullets and bombs used to fight international armed conflicts are also used to suppress insurgents—and are also used by those insurgents against the government they are trying to overthrow. Thus, of course, warriors on both sides are killed or grievously wounded. While these deaths and injuries are regrettable, they are at least predictable and understandable—those who take up arms for their cause can expect to be targeted. Injuries suffered by those in uniform are not a shock to the conscience.

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[1] JEAN PICTET, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW xix (Jean Pictet ed., 1988).

[2] Giles Whittell, Pyrrhic Victory In A War Without End, London Times, Feb. 2, 2000.

[3] A civil war is defined as "a war between two or more groups of inhabitants of the same [s]tate. A civil war may be fought for control of the government of a [s]tate, or it may be caused by the desire of part of the population to secede and form a new [s]tate." 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 88 (1982).

In contrast, injuries suffered by civilians[4] are less predictable and understandable[5]—they are a shock to the conscience. And, regrettably, civilian casualties are more likely to occur in civil war than in international armed conflict.[6] Given that civil wars are on the increase,[7] stronger steps need to be taken to protect civilians.

The primary mechanism of humanitarian law designed to protect civilians is the principle of "distinction."[8] Distinction requires that combatants[9] must only target military objectives, and refrain from targeting civilians and civilian objects.[10] Furthermore, distinction requires that those engaged in combat must distinguish themselves from non-combatants.[11] Thus, distinction protects civilians in two ways: first, directly, by ensuring that they are not targets of attack. The second protection is indirect: by requiring combatants to distinguish themselves, such as through the wearing of uniforms, enemy combatants are

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[4] Civilians are defined as those people who do not "take a direct part in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, art. 13(3) [hereinafter Protocol II].

[5] Saying civilian deaths are not predictable or understandable is not to suggest that they are surprising on a macro level. Clearly when civilians work or live near a battlefield, casualties among their numbers are inevitable. *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 8 (1996) (noting that "civilians share the general dangers of war in the sense that attacks on military personnel and military objectives may cause incidental damage"). However, on a micro level, when an individual civilian has undertaken no hostile act, his or her death can be seen as unpredictable, not understandable, and a shock to the conscience.

[6] *See infra* notes 42-46 and accompanying text.

[7] *See infra* notes 47-48 and accompanying text.

[8] *See infra* notes 133-166 and accompanying text

[9] "Combatants" are defined as "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains)." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 609, art. 43(2) [hereinafter Protocol I].

[10] *See infra* notes 136-158 and accompanying text.

[11] *See infra* notes 159-166 and accompanying text.

able to properly tell who is a legitimate target—in a battle where everyone was dressed as a civilian, everyone, including true civilians, could expect to be targeted.

While the principle of distinction is critical, the history of civil wars is replete with examples of warriors not complying with it.[12] Civilians have been routinely targeted, and rebels have dressed as civilians. How then can rebel forces be compelled to respect this principle? One possibility is to extend the concept of combatant immunity[13] to rebels in large-scale civil wars. Combatant immunity would provide a strong incentive for rebels to comply with the law of war: so long as they complied, they could not be prosecuted for their war-like acts. Thus, a rebel in uniform who shoots a soldier or bombs a military headquarters—but who refrains from targeting civilians—would be entitled to prisoner of war status. They could be held prisoner until the end of the conflict, but would not face prosecution and would be released after the conflict.

States fighting a rebellion would also benefit from extending combatant immunity to rebels. Two primary benefits would be achieved. First, by supporting the principle of distinction, fewer of the state's civilian citizens would be killed or injured. Second, since distinction requires the rebels to wear uniforms, they would be easier targets for the state's

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[12] *See infra* notes 41-46 and accompanying text.

[13] "Combatant immunity" means that "a combatant may not be punished for acts of hostility, including killing enemy combatants, as long as he respected international humanitarian law, and that he has to be repatriated at the end of active hostilities. In non-international armed conflicts, no such principle exists, and those who fight may be punished, under national legislation, for the mere fact of having fought." Letter from Dr. Toni Pfanner, Head of the Legal Division, International Committee of the Red Cross Headquarters, Geneva, to Naomi Roht-Arriaza, Professor of Law, University of California, Hastings (Apr. 15, 1997), *quoted in* Naomi Roht-Arriaza, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Combating Impunity: Some Thoughts on the Way Forward*, 59 LAW & CONTEMP. PROB. 93, 101 (1996).

soldiers. In this regard, while there are significant arguments against the application of combatant immunity to rebels,[14] overall it would be beneficial for both sides of the dispute.

While providing combatant immunity to rebels would be beneficial for all concerned, international humanitarian law does not require it. As traditional humanitarian law developed, there was a very clear dichotomy between laws applicable in international armed conflicts and those applicable in internal conflicts.[15] Combatant immunity was required in international wars, but not in civil wars. This was a reflection of the sovereignty of states; states wished to maintain the right to prosecute those who sought to overthrow them.[16]

Although the dichotomy between internal and international armed conflicts was traditionally very clear cut, the law is in a state of flux. Increasingly, states are agreeing to treaties that infringe on the actions they can take in internal struggles.[17] In addition to treaty law, customary international law has expanded to the point where the lines between internal and international wars have significantly blurred.[18] This blurring is the strongest in matters regarding the protection of innocent civilians. Finally, the very definition of "sovereignty" is changing.[19] Where it once stood as an absolute barrier to outside interference, sovereignty has lost some of its might.

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[14] *See infra* notes 71-72 and accompanying text.

[15] *See infra* notes 49-79 and accompanying text.

[16] *See infra* note 50 and accompanying text.

[17] *See infra* notes 80-79 and accompanying text.

[18] *See infra* notes 98-124 and accompanying text.

[19] *See infra* notes 125-132 and accompanying text.

Set against this backdrop, with the law in a state of flux and the concept of sovereignty on the wane, the international community has an opportunity to further develop and enhance humanitarian law. That enhancement could come through the extension of combatant immunity to rebels in large-scale civil wars, thus supporting the principle of distinction. To that end, this paper will argue that the best interests of all parties (and civilians) to a conflict are served by having the rebels protected by combatant immunity as long as they comply with the laws of war.

Part Two of the paper will briefly outline the history of civil war, and discuss why civil wars are on the rise, and how civilians suffer disproportionately during civil wars. Next, Part Three will discuss the state of the law regarding civil wars, including the traditional dichotomy between internal and international conflicts, and how that law is in a state of flux, particularly in matters dealing with the protection of civilians. Part Four will then analyze the principle of distinction, and how combatant immunity supports the principle. Finally, Part Five explains how the current flux in the law makes this an opportune time for states to advance the principle of distinction by extending combatant immunity to rebels in large scale civil wars.

II. The Rising Scourge of Civil War

Civil wars cause more bloodshed than any other type of conflict on the planet today.[20] They occur far more frequently than international wars,[21] and are increasingly violent.[22] Unfortunately, the victims of that violence have increasingly been civilians.[23] And, instead of being accidental victims, civilians have been directly targeted by all sides to the conflict.[24] As Human Rights Watch[25] noted in its 1995 World Report, "As in recent years, civilians were less the incidental victims of warfare than its targets. The purpose of military action in many corners of the world went well beyond defeating an opposing army to include eradicating its civilian sympathizers or even expelling a civilian population."[26]

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[20] *See* Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1, 2-3 (1999) (noting that internal wars are the prime wars being fought, and the main source of victims).

[21] Theodor Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554, 555 (1995) (noting that internal armed conflicts "occur with far greater frequency than international armed conflicts").

[22] *See* Louise Doswald-Beck, *Humanitarian Law in Future Wars, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 39, 51-52 (U.S. Naval War College INTERNATIONAL LAW STUDIES, Vol. 71, Michael Schmitt & Leslie Green eds., 1998) ("The prohibition of aggression, the rise in ideological wars, and the increasing intensity of non-international armed conflicts have all had the effect of introducing additional personal hatred for the enemy in the twentieth century [citation omitted]. For these reasons, the murder of civilians is particularly acute in non-international armed conflicts...Unfortunately, in that there appears to be no downturn in this trend, the problem could well become much worse in the next century....").

[23] *Id.* (noting that "murder of civilians is particularly acute in non-international armed conflicts"); Carrillo-Suarez, supra note 20, at 20 (Noting that in the Colombian civil war, less than one-third of the victims result from actual combat, and most of these victims "tend to be members of the civilian population who do not directly take part in the hostilities, such as peasant and rural workers, community activists and leaders, trade unionists, leftist opposition leaders, human rights defenders, and indigenous persons.").

[24] Human Rights Watch, HUMAN RIGHTS WATCH WORLD REPORT: 1992 22 (1992) [hereinafter HRW 1992] ("By far the largest number of victims of severe violations of human rights worldwide are the noncombatants who are killed, injured, deprived of food and other necessities, or forced to flee from their homes because of the manner in which opposing forces seek to prevail militarily.").

[25] "Human Rights Watch conducts regular, systematic investigations of human rights abuses in some seventy countries around the world. It addresses the human rights practices of governments of all political stripes, of all geopolitical alignments, and of all ethnic and religious persuasions. In internal wars it documents violations by both governments and rebel groups. Human Rights Watch defends freedom of thought and expression, due process and equal protection of the law; it documents and denounces murders, disappearances, torture, arbitrary imprisonment, exile, censorship and other abuses of internationally recognized human rights." Human Rights Watch, HUMAN RIGHTS WATCH WORLD REPORT: 1995 vii (1995) [hereinafter HRW 1995].

[26] *Id.* at xxiii.

The international community has taken note of this disturbing trend. The United Nations Security Council recently adopted Resolution 1265, which notes that "civilians account for the vast majority of casualties in armed conflicts and are increasingly targeted by combatants and armed elements"[27] and strongly condemned the deliberate targeting of civilians.[28] What has led to this alarming situation? This Part will analyze some of the causes of the increase in civil wars. It will also list some examples from recent history that show the devastation that is often visited on civilians in a civil war zone.

1. Sources of Increased Civil Violence

Several factors have coalesced to make civil wars more abundant and bloodier. The first factor is the availability of weapons.[29] Indeed, the International Criminal Tribunal for the Former Yugoslavia (ICTY),[30] in its *Tadic* decision,[31] recognized "technological progress" as a cause of the increasing frequency of civil wars.[32] While technological progress, in terms

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[27] U.N. SCOR, 73rd Sess., 4046th mtg. at 1, U.N. Doc. S/RES/1265 (1999).

[28] *Id.* at 2.

[29] HRW 1995, *supra* note 25, at xxiv.

[30] The ICTY was established by United Nations Security Council Resolutions 827, U.N. SCOR, 67th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), and 808, U.N. SCOR, 67th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993). The tribunal was established to prosecute "widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia. U.N. SCOR, 67th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993). The Security Council expressed its belief that prosecution of those committing these violations would help ensure "that such violations are halted and effectively redressed." *Id.*

[31] Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), *reprinted at* 35 I.L.M. 32 (1996).

[32] *Id.* at para. 97.

of advances in weapons technology, can refer to the high-technology precision guided weapons displayed during the Gulf War, the real problem in civil wars has been the ready availability of guns and landmines.[33]

Another factor cited by the *Tadic* court as causing civil wars was "increasing tension, whether ideological, inter-ethnic or economic."[34] A significant part of this increasing tension can be traced to the downfall of the Soviet Union; as Human Rights Watch noted in 1992, "[n]ow that the Cold War's proxy conflicts are winding down, the quest for ethnic, linguistic or religious purity, pursued by growing numbers, lies behind much of today's bloodshed."[35]

Another source for potential civil strife is the growing divide between rich and poor nations, combined with the advent of modern communications technology.[36] As some

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[33] *See* HRW 1995, *supra* note 25, at xxiv (noting that in "Angola, Afghanistan, Nagorno-Karabakh, Rwanda and Somalia, the slaughter was made immeasurably worse by external governments supplying abusive forces with the weapons of war"). The availability of guns and landmines has the effect of empowering potential rebels. Unlike the weapons that predated them—the sword, the spear, the bow and arrow—guns have the ability to cause a great deal of harm to a lot of people almost instantaneously. Thus, one rebel armed with a rapid-fire gun, can, if successful, kill a great many government soldiers. Similarly, a rebel armed with a landmine can cause great harm—and great terror—to the opposition soldiers. Knowing the ability of these weapons, rebels possessing them might feel emboldened to challenge their government militarily. Thus, availability of weapons has led to an increase in civil wars.

[34] *Tadic,* at para. 97.

[35] HRW 1992, *supra* note 24, at 1 (1992). The proxy conflicts between the United States and the Soviet Union helped prop up weak governments—when the superpower support was withdrawn, long-held ethnic tensions and formerly suppressed nationalism swirled to the forefront, creating a prime atmosphere for civil war. *Id.* at 5 (noting that "many have described the resurgent nationalism in Eastern Europe as a pot of simmering ethnic tensions that was waiting to explode once the lid of communist rule was removed"). Thus, where ethnic or religious animosity had been held in check by communist or dictatorial rule, when the heavy hand of the state is lifted, those groups may regain their dormant hatreds. The blossoming of those hatreds into violence can lead to internal struggle.

[36] Michael Schmitt, *Bellum Americanum: The U.S. View of Twenty-First-Century War and Its Possible Implications for the Law of Armed Conflict in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 389, 391 (U.S. Naval War College INTERNATIONAL LAW STUDIES, Vol. 71, Michael Schmitt & Leslie Green eds., 1998) (Noting the growing gap between rich and poor nations, and that citizens "of the disadvantaged States will be increasingly aware of their plight due to the pervasiveness of mass communication. The result

nations become richer, their citizens' lifestyles are improved. This improvement could manifest itself in lavish houses, cars, and, of course, plenty of food. In contrast, in those countries that remain poor, life remains very difficult, with securing the basic necessities of living a constant challenge. As modern communications permit the transmission of the rich country's lifestyle worldwide, citizens of poor countries are made aware of the starkness of the disparity,[37] and may choose to rebel against a government they hold accountable for their plight.

The reasons for civil war are complex. Certainly not one factor, by itself, will result in a civil war. For example, the presence of weapons, in and of itself, would not cause the war, since there would be no motive to use them. Similarly, the existence of ethnic hatred, without weapons, would not result in a fight. However, when these factors begin to coalesce, when the means and motives to overthrow a government or put down a hated internal minority are brought together, then a civil war may be difficult to avoid. And, as the next section briefly points out, this century has seen a great many such wars.

2. The Violent History of Civil War

The twentieth century has been heavily marred by the existence of numerous civil wars. In fact, as part of the reasoning for its findings,[38] the *Tadic* court cited to the large

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will be, at least in some areas, unrest and instability, as the 'have-nots' are sensitized to the gap between themselves and the 'haves.'").

[37] The image that suggests itself is of an episode of *Lifestyles of the Rich and Famous* being viewed by a starving family in a hovel in Bangladesh.

[38] *See infra* notes 101-116 and accompanying text.

number of civil wars, and that they had become "more and more cruel and protracted, involving the whole population of the State where they occur."[39] Examples it cited were "the Spanish civil war, in 1936-39, ... the civil war in the Congo, in 1960-68, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993."[40]

The monitoring activities of Human Rights Watch put the picture into sharper focus. In one year, 1991, they monitored:

> half a dozen wars in Africa (Angola, Ethiopia, Liberia, Mozambique, Somalia and Sudan); two wars in India (Kashmir and Punjab); two in Indonesia (Aceh and East Timor); five in other countries of Asia (Afghanistan, Burma, Cambodia, Philippines and Sri Lanka); the wars against the Kurds and the Shi'as in Iraq; the war in the Kurdish area of Turkey; the war in Yugoslavia; and the wars in three Latin American countries, Colombia, El Salvador and Peru. In addition, Human Rights Watch monitored internal armed strife of varying degrees of intensity in Guatemala, the Israeli-Occupied Territories, Nicaragua, Northern Ireland, Rwanda, South Africa, and in several of the republics of the former Soviet Union, particularly Georgia.[41]

In all of these internal armed conflicts, and others, civilians were regularly subjected to horrific violence. Examples of abuses of civilians come from Somalia,[42] Haiti,[43] and Latin America.[44] One commentator calculated that, in the civil strife in Colombia between 1988

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[39] *Tadic,* at para. 97.

[40] *Id.*

[41] HRW 1992, *supra* note 24, at 23.

[42] *Id.* at 33 ("In mid-November, a conflict between two factions of the United Somali Congress degenerated into all-out war on the streets of Mogadishu, causing unprecedented scenes of carnage and loss of civilian life.").

[43] *Id.* at 129 (noting that the coup in Haiti "was accompanied by a killing rampage by Haitian troopers unparalleled even in that troubled nation's recent history").

[44] *Id.* ("In Colombia, El Salvador, Guatemala and Peru, government forces are engaged in widespread political assassination, disappearance and torture of civilians perceived as opponents.").

and 1997, of the 3,628 deaths—approximately ten per day—only thirty percent were attributable to combat.[45] Some of these deaths were accompanied by horrific abuses—Human Rights Watch noted that in the first eight months of 1998, massacres were committed in which "bodies were also dismembered, decapitated, and mutilated with machetes, chain saws, and acid."[46]

The examples cited above demonstrate three trends. First, civil war has been very prevalent in the twentieth century, and there is every reason to believe it will continue to flourish in the twenty-first century. All of the factors that contribute to civil wars—availability of weapons, racial/ethnic/religious tensions, and the growing socio-economic divide—will continue to exist and probably expand.[47] The second trend is that civil wars will continue to be highly violent—as Professor Yoram Dinstein noted in a recent lecture, the "most harrowing, most sanguinary conflicts are usually internal."[48] Finally, the third trend is that the violence will increasingly involve civilians as victims—not only as incidental victims, but also as direct targets. These trends demonstrate that some action must be taken

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[45] Carrillo-Suarez, *supra* note 20, at 20 (Noting that in the period between 1988 and 1997 "the average of politically motivated or presumably politically motivated deaths were 3,628 a year, including combat casualties. This averages out to ten victims per day for ten years! Of these victims, only three correspond to civilian and military casualties as a result of combat.").

[46] Human Rights Watch, HUMAN RIGHTS WATCH WORLD REPORT: 1999 111 (1999).

[47] For a startling prediction of the future, *see* Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 94, at 44, 46-47 ("West Africa is becoming the symbol of worldwide demographic, environmental, and societal stress, in which criminal anarchy emerges as the real 'strategic' danger. Disease, overpopulation, unprovoked crime, scarcity of resources, refugee migrations, the increasing erosion of nation-states and international borders, and the empowerment of private armies, security firms, and international drug cartels are now most tellingly demonstrated through a West African prism...And West Africa's future, eventually, will also be that of most of the rest of the world.").

[48] Professor Yoram Dinstein, Address at The Judge Advocate General's School, United States Army, Charlottesville, Virginia (Mar. 1, 2000).

to break the cycle of violence being waged against innocent civilians. One possible solution, suggested in Part Five of this paper, is to furnish rebels with combatant immunity. However, prior to making that argument, attention must first be paid to the current state of the law, and note how the law is in a state of flux.

III. International Law in Internal Conflicts: A Rigid Rule in a State of Flux

Traditionally under international law there was a very clear dichotomy between the rules that applied to internal armed conflicts and those that applied to international armed conflicts—there were very specific rules governing inter-state wars with very few rules governing internal war.[49] This dichotomy was a reflection of state sovereignty—sovereign states wanted to handle insurrection without interference from the international community.[50] However, that rigid dichotomy has begun to break down in light of three inter-related developments. First, states are increasingly entering into treaties that restrict their ability to respond to internal threats. Second, customary international law has grown to expand the rules applicable in internal wars, particularly where the protection of civilians is concerned. Finally, the traditional concept of "sovereignty" is being eroded, such that it is not the

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[49] Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at para. 96, *reprinted at* 35 I.L.M. 32 (1996) (Noting the "stark dichotomy" between the regulation of international and internal armed conflicts, and that "interstate wars were regulated by a whole body of international legal rules governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion.").

[50] *Id.* (Noting that the lack of international rules governing civil wars was because "[s]tates preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other [s]tates into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community."); Doswald-Beck, supra note 22, at 52 (noting that "the detailed rules of international humanitarian law have been largely developed for international armed conflict").

absolute barrier to the international community it once was. Given these three trends, there is a significant state of flux in the law applicable to internal wars. This Part will explore that flux. Section One will outline the traditional rules applicable to internal war with a brief contrast to those applicable to international war. Section Two will describe some of the international treaties states have entered into which also govern their conduct during civil war, and analyze why that represents a change in the law. Section Three will discuss the emerging norms of customary international law, and, finally, Section Four will examine the concept of sovereignty as it currently stands.

A. The Traditional Rules on International Law in Internal Armed Conflicts

The starting point for discussion of the traditional view of humanitarian law in internal armed conflicts must be Article 3 common to the four Geneva Conventions.[51] Promulgated in 1949, Common Article 3 was the international community's first codification of international law applicable to internal conflicts. It provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> (1) Persons taking *no active part in the hostilities*, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

[51] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. 3362 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea, Aug. 12, 1949, T.I.A.S 3363 [hereinafter GWS Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. 3363 [hereinafter GPW]; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3365 [hereinafter GC] [hereinafter Common Article 3].

(a) *violence to life and person*, in particular *murder* of all kinds, mutilation, cruel treatment and torture;
(b) taking of *hostages*;
(c) *outrages upon personal dignity*, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the *judicial guarantees* which are recognized as indispensable by civilized peoples.

(2) The wounded, sick and shipwrecked shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[52]

Among those protected by Common Article 3 are those who take "no active part in the hostilities."[53] Those who take no part in hostilities are civilians,[54] and it is prohibited to murder them,[55] take them as hostages,[56] expose them to outrages on their dignity,[57] or try them without some due process.[58] These are clearly important protections, especially since

[52] Common Article 3, *supra* note 51 (emphasis added).

[53] Common Article 3(1), *supra* note 51.

[54] Doswald-Beck, *supra* note 22, at 54 ("Civilians are referred to simply as persons who do not take an "active" part in the hostilities.").

[55] Common Article 3(1)(a), *supra* note 51.

[56] Common Article 3(1)(b), *supra* note 51.

[57] Common Article 3(1)(c), *supra* note 51.

[58] Common Article 3(1)(d), *supra* note 51.

they require "each Party to the conflict"[59] to comply with their provisions. Thus, civilians are protected from these acts being done by either the government or the rebel troops.[60]

However, while these rights are important, they fall significantly short of the sweeping protections afforded in the rest of the Conventions.[61] Two stark differences will elucidate the point. First, Common Article 3 does not have a grave breach provision,[62] and the grave breach provisions of the rest of the Conventions do not apply to internal wars.[63] Without a grave breach provision, there is no requirement to seek out and prosecute violators. Second, Common Article 3 does not address the means and methods of warfare—there is no

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[59] Common Article 3, *supra* note 51.

[60] One interesting issue is how a treaty can be binding on rebels, not just on the government that signed the treaty. One commentator, Charles Lysaght, suggests that the government ratification of a treaty is binding on all of its citizens, even if those citizens are seeking to overthrow the government. Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U.L. REV. 9, 12 (1983). Mr. Lysaght was a Member of the Irish Delegation at the Diplomatic Conference for the Reaffirmation and Development of Humanitarian Law. *Id.* at 1.

[61] While the mere number of articles in a treaty is not determinative of the amount of protection afforded, it is instructive to note that, whereas Common Article 3 is the only provision providing protection in internal wars, there are 140 other articles in the Fourth Geneva Convention providing protection to civilians in international armed conflict. GC, *supra* note 51, art. 1-2, 4-141.

[62] The Convention defines "grave breaches" of its provisions as the following acts: "if committed against persons or property protected by the present Conventions: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. *Id.* art 147. Parties to the Convention are required to search out those who have committed grave breaches, and to prosecute or extradite them. *Id.* art. 146.

[63] Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at para. 81, *reprinted at* 35 I.L.M. 32 (1996) (Deciding that the system of grave breaches "can only be prosecuted when perpetrated against persons or property regarded as 'protected' by the Geneva Conventions under the strict conditions set out by the Conventions themselves...Clearly these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict.").

requirement to attack only military objectives and not target civilians[64] and civilian objects—and therefore there are not explicit protections for civilians.[65]

The ICRC initially recommended that each of the Geneva Conventions contain a provision that the entire body of humanitarian law applied to internal conflicts, unless either the state or the rebels declared that it would not apply.[66] This was rejected by states concerned that granting such full rights to rebels would adversely affect their ability to suppress rebellions.[67] Indeed, Common Article 3 represents the compromise between those states that wanted the entire Geneva Conventions to apply to internal war, and those who

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[64] Arguably, the prohibition against murder would prohibit direct attacks against civilians. However, Common Article 3 lacks the specific prohibitions on targeting civilians found in subsequent treaties, *see, e.g.*, Protocol II, *supra* note 4, art 13(2) ("The civilian population as such, as well as individual civilians, shall not be the object of attack"), nor does it have the broad tenor of protection provided for civilians in the rest of the 1949 Geneva Conventions. A brief review of some of the articles of the fourth Convention discloses the broad spectrum of protections sought to be effected for civilians. Article 15 provides for proposals to establish "neutralized zones" in areas where combat is on going for the protection of the wounded and civilians. GC, *supra* note 51, art 15. Article 16 provides that the wounded, sick, infirm and pregnant women "shall be the object of particular protection and respect." *Id.* art 16. Article 27 is the first of 115 articles in Part III of the Convention dealing with the treatment of "protected persons." Protected persons are those who find themselves in the "hands of a Party to the conflict or Occupying Power of the which they are not nationals." *Id.* art 4. The Convention seeks to protected this particularly vulnerable category of persons with broad language, as they are in all circumstances entitled "to respect for their persons, their honour, their family rights, their religions convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity." *Id.* art 27.

[65] Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U.J. INT'L L. & Pol'y 49, 60 (1993) (noting that "Article 3 fails to include rules that govern the means and methods of warfare [footnote omitted], and therefore does not explicitly protect the civilian population from attacks or effects of such attacks").

[66] Oscar M. Uhler et al., COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 29 (1958) (Noting the ICRC's recommendation that each Conventions should begin with this article: "In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse Parties, unless one of them announces expressly its intention to the contrary.").

[67] *See* Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 929-30 (1994) (noting that states did not want to grant prisoner of war status to rebels because granting "rebels this privilege would thereby undermine the ability of governments to suppress revolt because prisoners of war can only be prosecuted for violations of the laws of war and not for treason in national courts").

wanted none of it to apply.[68] Many of these same arguments were made when the international community was debating the 1977 Protocol II for the Protection of Victims of Non-International Armed Conflicts.[69]

At the beginning of the conference, the ICRC's position was that the full body of humanitarian law should apply "when the rebel Party contains certain constituent elements of a state (provisional government, organized civil authority, effective control of a territory), this being true independently of any recognition of belligerency on the part of the authorities in power."[70] However, the ICRC's view did not carry the day. States were reluctant to allow the intrusion on their sovereignty—some feared that rebel groups might be legitimized if afforded recognition by the Protocol.[71] Furthermore, states did not want to have rebels

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[68] Lysaght, *supra* note 60, at 11 ("Common article 3 is the outcome of a compromise hammered out at the 1949 Diplomatic Conference between those who believed that the Geneva Conventions should apply to all wars of a sufficient scale and those who felt that they should have no application except in armed conflicts between states.").

[69] *See id.* at 21 (noting that many states wanted to extend prisoner of war status to rebels, but that few governments were willing to give away the right to punish rebels).

[70] 5 INTERNATIONAL COMMITTEE OF THE RED CROSS, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF THE INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS 14 (1971). For an interesting discussion on the ICRC's stand on its role in internal armed conflicts, *see* *id.* at 1-9.

[71] One debate on Protocol II is illustrative of the point. The original Protocol II contained a seemingly innocuous provision entitled "Article 3. – Legal status of the parties to the conflict." Draft Protocol Additional to Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 3. In pertinent part it read "The legal status of the parties to the conflict ... shall not be affected by the application of the provision of the present Protocol." *Id.* The Zairian delegation objected to the article because it referred to the "status" of the rebels, and, in effect gave the rebels an international legal personality. VII Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 50th plen. mtg., Annex at 104, CDDH/SR.50 (Federal Political Department, Bern, 1978). According to the delegation, the rebels' "only legal status is that granted them under the domestic laws of their national State. To claim otherwise is to place a sovereign [s]tate on the same footing as a rebel movement, and that would imply de facto recognition of the movement." *Id.* The article was removed by consensus. VII Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 50th plen. mtg., Annex at 85, CDDH/SR.50 (Federal Political Department, Bern, 1978).The importance of sovereignty to many states is demonstrated through this argument. The proposed article stated that the legal status of the

granted combatant immunity by international law because it "would tend to encourage insurrections by reducing the personal risks of the rebels."[72]

As finally promulgated, Protocol II sought to insure protections for victims of internal armed conflicts.[73] Although not as sweeping[74] as Protocol I,[75] which applies to international armed conflicts, Protocol II does have some important protections. First and foremost, the

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parties "shall not be affected." Draft Protocol Additional to Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 3. Thus, on its very face the article left the legal status the same—whether or not Zaire, or any state, chose to recognize its rebels would be a completely internal matter. However, the prospect of the international community recognizing that rebels had a "status" at all proved too much of an intrusion into internal affairs.

[72] Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U.L. REV. 53, 59 (1983) ("Governments, particularly those that may be affected by an emerging dissident or separatist movement, are unwilling to concur in any rule of international law that, in effect, would repeal their treason laws and confer on their domestic enemies a license to kill, maim, or kidnap security personnel and destroy security installations, subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict. These governments fear that any *international* rule establishing the combatants' privilege and prisoner of war status in internal armed conflicts would not only enhance the perceived standing of the insurgents, but also would tend to encourage insurrection by reducing the personal risks of the rebels." (emphasis in original)).

[73] Protocol II, *supra* note 4, preamble. The entire preamble reads:

> The High Contracting Parties,
>
> Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,
>
> Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,
>
> Emphasizing the need to ensure a *better protection for the victims of those armed conflicts*,
>
> Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience."

Id. (emphasis added).

[74] Protocol I has 102 articles, Protocol I, *supra* note 9, art. 1-102, whereas Protocol II consists of 28 articles, Protocol II, *supra* note 4, art. 1-28.

[75] Protocol I, *supra* note 9.

Protocol expressly protects civilians against direct attack.[76] Article 13 provides that the "civilian population as such, as well as individual civilians, shall not be the object of attack."[77] And, although civilians and civilian objects are not expressly protected against indiscriminate or disproportionate attacks, such protection can reasonably be implied by the general protections afforded.[78] However, since the Protocol does not provide for criminal sanctions, its ability to enforce those protections is greatly diminished.[79]

While some government experts had hoped for a sweeping agreement, the importance of sovereignty proved too strong to allow the international community to tightly regulate internal struggles. However, as will be discussed next, in one area of the law—international treaties—states have shown some willingness to allow international law to govern even in internal conflicts.

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[76] Goldman, *supra* note 65, at 63 ("Unlike article 3, Protocol II expressly protects individual civilians against direct attacks and inferentially protects them and civilian objects from indiscriminate or disproportionate attacks.").

[77] Protocol II, *supra* note 4, art. 13(2). The full text of Article 13 is:

> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
> 2. The civilian populations as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population are prohibited.
> 3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Id.

[78] MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 676 (1982) (arguing that "the concept of general protection is broad enough to cover protections which flow as necessary inference from other provisions of Protocol II").

B. International Treaties in Internal Armed Conflicts

The traditional design of international law is to regulate inter-state relations—thus, humanitarian law was initially developed to regulate the conduct of international armed conflicts.[80] More specifically, treaties dealing with types of weapons have traditionally been written to apply only to states *vis a vis* each other in international war.[81] Thus, the choice of weapons to be used by a state to quell a rebellion has generally been seen as being beyond the reach of specific humanitarian law treaties.[82] However, the inclusion of treaty provisions regulating the use of certain weapons in "any circumstances"[83] is breaking away from this traditional mold.

A good starting point to see the change in the law is with treaties regulating the use of gas weapons. The 1925 treaty outlawing the use of gas and bacteriological weapons[84] does

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[79] Lopez, *supra* note 66, at 932 (arguing that "the absence of criminal sanctions for violations of Article 3 and Protocol II leaves what meager provisions there are largely unenforced").

[80] Doswald-Beck, *supra* note 22, at 52 ("It is an obvious truism that international law is primarily aimed at regulating relations between States, human rights law notwithstanding. Despite Article 3 common to the Geneva Conventions and Additional Protocol II, the detailed rules of international humanitarian law have been largely developed for international armed conflicts.").

[81] Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium*, *in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 185, 192 (U.S. Naval War College INTERNATIONAL LAW STUDIES, Vol. 71, Michael Schmitt & Leslie Green eds., 1998) ("The treaty provisions have usually been applicable only in conflicts between the parties to the treaty concerned and even the general principles, which apply as part of customary law, have usually been seen as applicable only in international armed conflicts.").

[82] *See id.*

[83] See *infra* notes 89-95 and accompanying text.

[84] Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

not clearly apply to internal conflicts.[85] However, two later treaties in this area do apply to internal conflicts. The 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction[86] requires that the parties comply "in any circumstances."[87] In 1993, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction,[88] was made applicable "under any circumstances."[89]

Treaty law has also encroached on internal armed conflicts with respect to the use of landmines. The 1996 Amended Additional Protocol II[90] to the Additional Protocol II on Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention[91] was explicitly made applicable to internal conflicts.[92] Similarly, the outright ban on landmines promulgated in 1997, the United Nations Convention on the Prohibition of the Use,

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[85] Meron, *supra* note 21, at 574-75 (noting that "the 1925 (Geneva) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare [citation omitted] was arguably addressed to international wars only").

[86] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

[87] *Id.* art 1.

[88] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 32 I.L.M. 800 (1993).

[89] *Id.* art 1(1).

[90] Protocol on Prohibitions or Restrictions on the Use Of Mines, Booby-Traps And Other Devices (Protocol II) As Amended, May 3, 1996, 35 I.L.M. 1206

[91] Additional Protocol II on Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention, 1980, 19 I.L.M. 1523 (1980)

[92] Protocol on Prohibitions or Restrictions on the Use Of Mines, Booby-Traps And Other Devices (Protocol II) As Amended, May 3, 1996, 35 I.L.M. 1206, art 1(2).

Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction[93] goes even further—not only must states "never under any circumstances" use landmines,[94] they must also destroy them.[95]

Although treaties regulating the types of permissible weapons were traditionally limited to international armed conflict, that tradition is giving way to allow some control during civil war. By allowing the international community to dictate the weapons states may use to fight insurgents, those states are surrendering part of their sovereignty.[96] Part of the driving force behind expanding these treaties, particularly the landmines treaties, is the devastating effect these weapons have on civilians, particularly in civil wars.[97] Thus, states which are parties to these treaties have made a tacit agreement that the surrender of some of their sovereignty is a worthwhile price to pay for the protection of innocent civilians in civil wars. This is an important development, because it demonstrates state willingness to put the needs of civilians above traditional notions of sovereignty. Further protection of civilians—with its concomitant reduction in sovereignty—is found in the development of customary international law, discussed next.

C. The Role of Customary International Law

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[93] United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

[94] *Id.* art (1)(a).

[95] *Id.* at 1(2). Although beyond the scope of this paper, for an interesting discussion of the interplay of the landmine treaties, *see* Greenwood, *supra* note 81, at 208-11.

[96] *See infra* notes 125-132 and accompanying text.

While international treaty law has expanded somewhat into internal armed conflicts, the most dramatic incursion has come through the development of customary international law. Part of the drama of this incursion results from the belief, held by many until recently, that customary international law did not reach to internal conflicts, and that international law was incapable of imposing individual criminal liability for conduct occurring during such conflicts.[98] The ICTY, in its landmark *Tadic*[99] Appeal case, shattered that belief by holding that certain principles of humanitarian law that had previously only applied to international wars would also apply to internal conflict, "by virtue of their relative primacy within the modern hierarchy of international human rights."[100]

Much of the court's opinion deals with the interpretation of the Statute that created it, and whether the tribunal had jurisdiction in both international and internal wars. The court

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[97] Greenwood, *supra* note 81, at 209-10 (noting that some of the worst effects mines have had were in the civil wars in Cambodia and Angola).

[98] William Fenrick, *The Development of the Law of Armed Conflict through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 77, 96 (U.S. Naval War College INTERNATIONAL LAW STUDIES, Vol. 71, Michael Schmitt & Leslie Green eds., 1998) ("Reputable authorities have been of the view that no customary law exists for internal conflicts [citation omitted] and that there is no basis for an assignment of criminal responsibility for acts occurring in internal conflicts except by a domestic court in the [s]tate where the conflict occurred [citation omitted]."); Meron, *supra* note 21, at 559 ("Until very recently, the accepted wisdom was that neither common Article 3 (which is not among the grave breaches provisions of the Geneva Conventions) nor Protocol II (which contains no provisions on grave breaches) provided a basis for universal jurisdiction, and that they constituted, at least on the international plane, an uncertain basis for individual criminal responsibility [citation omitted].").

[99] Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at para. 81, *reprinted at* 35 I.L.M. 32 (1996).

[100] Mark R. von Sternberg, *Yugoslavian War Crimes and the Search for a New Humanitarian Order: The Case of Dusko Tadic*, 12 ST. JOHN'S J.L. COMM. 351, 361-62 (1997) ("Finding not all the rules applicable to internal wars governed in internal struggles, the Appeals Chamber nonetheless determined that certain broad principles of international humanitarian law, which had previously applied only to international conflicts, were now relevant to conflicts of a civil nature by virtue of their relative primacy within the modern hierarchy of international human rights.").

first held that Article 2[101] of the statute, which authorizes the punishment of "grave breaches,"[102] was applicable only in international armed conflicts.[103] The court noted that, since a grave breach gives rise to universal mandatory jurisdiction,[104] the requirement that grave breaches apply only during international armed conflicts "was a necessary limitation on the grave breaches system in light of the intrusion on State sovereignty that such mandatory universal jurisdiction represents."[105] Thus, to allow the tribunal to punish grave breaches in internal conflicts would be an over-extension into the sovereignty of states.[106]

Although the court rejected the existence of grave breaches in internal conflicts, it did note that the doctrine of human rights and recent trends of state practice had "blur[red] in

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[101] The entire text of Article 2 reads:

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
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> (a) wilful killing;
> (b) torture or inhuman treatment, including biological experiments;
> (c) wilfully causing great suffering or serious injury to body or health;
> (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
> (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
> (g) unlawful deportation or transfer or unlawful confinement of a civilian;
> (h) taking civilians as hostages.

[102] *See supra* note 62 and accompanying text.

[103] *Tadic,* para. 80

[104] *See supra* note 62 and accompanying text

[105] *Tadic,* para. 80.

[106] The court did note that the United States, in its *Amicus Curiae* brief, contended that grave breaches provisions do apply to internal conflicts. The court, while rejecting the position, noted its significance: the United States' position "articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States." *Id.* at para. 83

many respects the traditional dichotomy between international wars and civil strife."[107] The court noted four distinct reasons why this dichotomy has been blurred: First, is the increase of civil wars, both because of technology, and also increasing tension.[108] Second, it noted that civil wars have become more "cruel and protracted" and that the corresponding all-out resort to violence has "taken on a magnitude that the difference with international wars has increasingly dwindled."[109] Third, it noted that states have become increasingly inter-dependent, and that international law is needed to help reduce "adverse spill-over effects" of civil wars.[110] Finally, the court noted that, with the development of human rights doctrines,[111] "significant changes in international law" had taken place, and that a "[s]tate-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach."[112] Using these four reasons, the court concluded that:

> the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign [s]tates are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a

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[107] *Id.*

[108] *Id.* para. 97.

[109] *Id.*

[110] *Id.*

[111] While beyond the scope of this paper, briefly put, human rights law prohibits a state, as a matter of policy, from practicing, encouraging or condoning any of the following: (1) genocide; (2) slavery or slave trade; (3) the murder or causing the disappearance of individuals; (4) torture or other cruel, inhumane or degrading treatment or punishment; (5) prolonged arbitrary detention; (6) systematic racial discrimination; or (7) a consistent pattern of gross violations of internationally recognized human rights. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at § 702.

[112] *Tadic,* para. 97.

> sovereign [s]tate?[113] If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings it is only natural that the aforementioned dichotomy should gradually lose its weight.[114]

Whether this dichotomy had been "blurred" or had "los[t] its weight," the court concluded that:

> it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[115]

The incorporation of these protections into internal conflicts was not a "full and mechanical transplant" of international armed conflict rules, rather only the "general essence of those rules, and not the detailed regulations they may contain, has become applicable to internal conflicts."[116]

This decision is a remarkable development. It transplanted into civil war rules that the international community had understood as applying only to international war.[117] One

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[113] One answer to this question, which the court does not address, is that less than twenty years prior to its decision—during the debate about Protocol II, *see supra* notes 69-72 and accompanying text—the international community had rejected a stronger presence of international law in internal conflicts.

[114] *Tadic,* para. 97.

[115] *Id.* para. 127.

[116] *Id.* para. 126.

[117] Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 A.J.I.L. 238, 243 (1996) (opining that "the Tribunal's apparent opinion that all serous breaches of the Geneva Conventions—outside common Article 3—that are not listed as "grave breaches" and that, until recently, were considered to govern international wars only, are already applicable to noninternational armed conflicts may prove more controversial").

commentator, Theodor Meron,[118] opined that this opinion shows the "renewed vitality and potential" for the use of customary international law in the development of humanitarian law applicable to civil wars.[119] He lists four ways that customary law can be used for the "evolution" of law governing internal strife:

> First, rules initially stated in treaty provisions governing noninternational armed conflicts, such as common Article 3 and Additional Protocol II, can be transformed into customary law. Second, through customary law, some rules have also been recognized as norms whose violation gives rise to individual criminal responsibility...Third, general principles first developed for international wars, such as proportionality and necessity, may be extended through customary law to civil wars. Fourth, prohibitions on certain weapons and means of warfare such as poison gas and land mines are gradually being applied to internal armed conflicts through customary law, as well as through the more visible process of treaty making.[120]

Borrowing from Mr. Meron's four-part approach, the approach most immediately relevant to the concept of extending combatant immunity to rebels is number three—having general principles initially developed for inter-state wars apply, through the growth of customary international law, to internal conflicts. Simply stated, combatant immunity is a general principle of humanitarian law that applies to international war. Arguably, then, through customary international law, combatant immunity could be extended to apply to rebels in civil wars. This concept is supported by reviewing those inter-state war principles the *Tadic* court said do apply to internal war. Of the five principles extended into internal war, three—protection of civilians from hostilities and indiscriminate attacks, protection of

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[118] Mr. Meron assisted the Prosecutor in the jurisdictional aspects of the *Tadic* case. *Id.* at 238.

[119] *Id.* at 244 ("The *Tadic* decision demonstrates the renewed vitality and potential of customary international law in developing humanitarian law for internal armed conflicts.").

[120] *Id.*

civilian objects, and protection of those not in combat—deal specifically with protecting the innocent. Indeed, for much of the opinion, the *Tadic* court focused specifically on rules designed to protect the innocent and the role of human rights law.[121] Since the protection of innocents is so critical to the transmission of inter-state rules to internal wars, any principle which has as its core the protection of civilians—and combatant immunity does[122]—should also be extended into internal wars. Meron suggests that continued expansion of international conflict laws to internal wars is very likely to continue—in his words, "the direction of the evolution is clear."[123]

The *Tadic* decision could prove a watershed event in the development of international law. It demonstrates the ability of humanitarian law, through the development of customary international law, to adapt to changing circumstances. The court noted the changing nature of civil wars, and the changing nature of the focus of international law—away from sovereignty and towards people-oriented—and determined that the rules that apply to internal conflicts had also changed.[124] This type of approach could reasonably used with any principle that affords protection to innocent civilians.

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[121] *Tadic,* para. 97-119.

[122] *See infra* notes 167-170 and accompanying text.

[123] Meron, *supra* note 117, at 242-43 ("I agree that, as a matter of law, some important Hague rules already apply to noninternational armed conflicts and that, as a matter of policy, most perhaps all Hague rules should be applicable *mutatis mutandis* [citation omitted]. The direction of the evolution is clear."); *see also* Greenwood, *supra* note 81, at 219 ("The trend of extending the law of weaponry from international armed conflict to conflicts within States is likely to prove irreversible.").

[124] *Tadic,* para. 97.

One of the areas the *Tadic* court focused on was the changing view of international law away from a tight focus on state sovereignty and towards a people-oriented view. This suggests that the nature of "sovereignty" itself is in a state of flux. The current status of the concept of sovereignty will be considered next.

D. The Current Status of "Sovereignty"

The traditional view of sovereignty held that all states held the same sovereign powers, and that the state was the primary actor in the international community.[125] This view is reflected in the words of former Secretary-General Boutros Boutros Ghali, as he explained why intervention in a civil war was not permissible: "It is purely an internal affair. And we are not allowed to enter an internal affair...unless the two protagonists to the dispute agree for our intervention."[126]

A subsequent Secretary-General added an interesting twist. Kofi Annan noted that the principle of sovereignty was as vital as ever; however the world's understanding of what constitutes sovereignty is "evolving."[127] One commentator has suggested uncoupling the notion of statehood from that of sovereignty, and allowing non-governmental organizations

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[125] *See* U.N. CHARTER art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

[126] Duncan B. Hollis, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 793-94, n. 6 (1995) *quoting* Larry King Live: Interview with Boutros-Boutros Ghali (CNN television broadcast, Dec. 22, 1994), Transcript No. 1312.

[127] Kofi A. Annan, *Peacekeeping, Military Intervention, and National Sovereignty in Internal Armed Conflict*, *in* HARD CHOICES 55, 56-57 (Jonathan Moore ed., 1998).

to perform more state-like functions.[128] Given the difficult world in which we live, Secretary General Annan had an interesting perspective: "The implications of human rights abuses and refugee and other migratory flows for international peace and security are forcing us to take a fresh look at sovereignty from a different perspective: sovereignty as a matter of responsibility, not just power."[129]

Certainly the *Tadic* court, with its notion that sovereignty is yielding to the protection of human beings, [130] is in accord with Secretary-General Annan. If sovereignty is about more than power—if in fact sovereignty is coming to be understood as a matter of responsibility—then the sovereign must do what it can to accept that responsibility, and to act responsibly on the world stage. Part of acting responsibly is to recognize that, as the world changes, the law that governs the world—international law—needs to change also. And, as the nature of conflict changes, the law that governs that conflict—humanitarian law—must also change. Traditionally states have rejected any attempt to regulate their internal conflicts, erecting a solid barrier surrounding their borders. States need to cast off that comfortable but antiquated response, and embrace the newer version of sovereignty. When states accept

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[128] Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. INT'L ECON. L. 745 at 753 (1997) ("The category of recognized actors should be expanded [beyond states] to admit the new entities now exercising considerable power [such as non-governmental organizations which are explicitly included in numerous international agreements]. Doing so requires recognizing that non-[s]tates may possess some powers previously considered 'sovereign.' Uncoupling 'statehood' from 'sovereignty' facilitates a scheme in which a [s]tate can cede some 'sovereign' elements while remaining a full, legitimate international actor. Simultaneously, other non-state entities can wield powers traditionally reserved to the sovereign without being considered '[s]tates.'").

[129] Annan, *supra* note 127, at 57.

[130] Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at para. 97, *reprinted at* 35 I.L.M. 32 (1996) ("State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.").

sovereignty as way to protect people—with the crown comes the duty to its citizens[131]—then states must do everything in their power to protect the innocent. One way to protect the innocent is to confer combatant immunity on rebels.[132]

International humanitarian law is in a state of flux. The wall clearly separating the rules in international and internal armed conflicts is crumbling. Those countries clinging to that wall face daunting obstacles: treaty law, customary international law, and the very definition of "sovereignty" itself are pulling that wall down. States should embrace the change, and recognize it as an opportunity to protect innocent lives. One way to protect innocents is by providing incentives to warriors to adhere to the principle of distinction. The next part will analyze this critical principle, and discuss how it is well-served by having rebels protected by combatant immunity.

IV. The Cardinal Principle of Distinction

The principle of distinction is one of the most important concepts in humanitarian law; indeed, the International Court of Justice has described it as one of the two "cardinal principles"[133] of the law of war. There are two components to this principle: First, is the requirement that civilians not be targeted, that is, that in choosing targets, combatants must

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[131] *See* von Sternberg, *supra* note 100, at 353 (noting a "recent jurisprudential shift away from regulating the rights of sovereign states *inter sese*, to a corresponding emphasis on protecting human rights of individuals within the international community").

[132] *See infra* notes 172-176 and accompanying text.

[133] Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, reprinted in 35 I.L.M. 809,827 (1996).

distinguish between legitimate military objectives and civilians or civilian objects, and only target military objectives.[134] The second component is that combatants must wear uniforms, or some other emblem, so that they can be *distinguished* from civilians by enemy soldiers.[135] Both of these components will be discussed in turn. Then the concept of "combatant immunity" will be analyzed to see how it supports the principle of distinction.

A. The First Component: Distinction as a Requirement to Not Target Civilians

Protocol II, which is definitionally applicable to internal armed conflicts,[136] mandates distinction in Article 13, entitled "Protections of the civilian population."[137] It provides:

> 1. The civilian population and individual civilians shall enjoy *general protection* against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
> 2. The civilian population as such, as well as individual civilians, *shall not be the object of attack.* Acts or threats of violence the primary purpose of which is to *spread terror* among the civilian population are prohibited.
> 3. Civilians shall enjoy the protection afforded by the Part, unless and for such time as they take a *direct part* in hostilities.[138]

Thus, at a minimum, civilians are entitled to these protections during civil war: a right to "general protection"[139] against the dangers of war, a requirement that either individually or as a population they are not to be "the object of attack,"[140] and that the spread of terror cannot

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[134] *See infra* notes 136-158 and accompanying text.

[135] *See infra* notes 159-166 and accompanying text.

[136] Protocol II, *supra* note 4, art. 1.

[137] *Id.* art 13.

[138] *Id.* art. 13 (emphasis added).

[139] *Id.* art 13(1).

[140] *Id.* art 13(2).

be intentionally used against them.[141] Article 13 also defines when they are entitled to these protections—"unless and for such time as they take a *direct part* in hostilities."[142]

These are doubtless important protections. Requiring that civilians not be the object of attack is a very concise way to state one prong of the basic rule of distinction. However, Protocol II has not been universally adopted, and thus does not apply in all internal conflicts. After *Tadic*, the question becomes: what rules from international armed conflicts should also apply in internal wars as a matter of customary international law?[143] The *Tadic* court found that rules requiring the "protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property,[144] protection of all those who do not (or no longer) take active part in hostilities."[145] However,

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[141] *Id.* art 13(2).

[142] *Id.* art 13(3) (emphasis added).

[143] First, it must be noted that there is no law of precedent in international law—just because the Tadic court ruled as it did, does not bind future courts to the same outcome. Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19 (2nd ed. 1973) ("Judicial decisions are not strictly speaking a formal source [of international law] but in some instances at least they are regarded as authoritative evidence of the state of the law."). However, the decision does represent powerful persuasive authority. *Id.* Accordingly, this analysis will proceed as if *Tadic* were binding.

[144] Protocol II also expressly provides for this protection in Article 16, Protection of cultural objects and of places of worship. It reads:

> Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military attack.

Protocol II, *supra* note 4, art. 16.

[145] Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at para. 127, *reprinted at* 35 I.L.M. 32 (1996).

only the "general essence" of these rules, not the "detailed regulation" apply to internal conflict.[146]

In determining what constitutes customary international law, the *Tadic* court noted the importance of the United States.[147] The United States' position on Protocol I was spelled out at a conference analyzing the additional protocols. At this conference, Mr. Michael Matheson, the Deputy Legal Advisor to the Department of State,[148] stated which provisions of Protocol I the United States supported and "should be observed and in due course recognized as customary law, whether they are presently part of that law or not."[149] Mr. Matheson discussed Part IV of Protocol I, which deals with protection of the civilian population.[150] He stated that much of that part was "useful and deserving of treatment as customary law," but that "certain provisions present serious problems and do not merit such treatment."[151] Among the matters he listed as objectionable to the United States was the

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[146] *Tadic,* para. 126.

[147] *Id.* para. 83 (noting the importance of the United States' legal position since it is one of the permanent members of the Security Council, and might reflect a change in *opinio juris*).

[148] Michael Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, in the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law*, 2 AM. U.J. INT'L L. & POL'Y 419 (1987).

[149] Id. at 422 ("Even within the NATO Alliance, there are substantial differences in the general readiness of government lawyers to recognize that a new rule of warfare has come into customary law, quite apart from the substance of the rule in question. As a result, in our discussions with our allies to date we have not attempted to reach an agreement on which rules are presently customary law, but instead have focused on which principles are in our common interests and therefore should be observed and in due course recognized as customary law, whether they are presently part of that law or not.").

[150] Protocol I, *supra* note 9, Part IV.

[151] Matheson, *supra* note 148, at 426 (Part IV "of the Protocol deals with the critical subject of the protection of the civilian population [citation omitted], which was the focus of much of the work of the Diplomatic Conference. Here again, much of this part of the Protocol is useful and deserving of treatment as customary law, although certain provisions present serious problems and do not merit such treatment.").

prohibition in Protocol I on reprisals.[152] Article 48[153] was not listed as being objectionable, and only that part of Article 52[154] that deals with reprisals was objectionable. Accordingly, the United States considers, at a minimum, Article 48 and most of Article 52 as deserving support and treatment as customary law.

Article 48 of Protocol I contains the "Basic rule" regarding the protection of civilians against the effects of hostilities: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian populations and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[155] Article 52 iterates the requirement not to target civilian objects, then defines military objectives are those "objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or

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[152] *Id.* ("[W]e do not support the prohibition on reprisals in article 51 and subsequent articles.").

[153] Protocol I, *supra* note 9, art. 48.

[154] *Id.* art. 52. The entire text of the article reads:

> 1. *Civilian objects shall not be the object of attack or of reprisals.* Civilian objects are all objects which are not military objectives as defined in paragraph 2.
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
> 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being use to make an effective contribution to military action, it shall be presumed not to be so used.

Id. (emphasis added).

[155] *Id.* art. 48.

neutralization, in the circumstances ruling at the time, offers a definite military advantage."[156] Thus, unless a proposed target meets this definition it would not satisfy the principle of distinction and would not be a lawful target.

It is unclear from reading *Tadic* what part of these rules would be "general essence" and what would be "detailed regulation." At a minimum, however, in order to carry into effect the protection of civilians desired by the court, the general essence would have to include the basic rule that civilians and civilian objects are not to be targeted.[157] Arguably, the definition of what constitutes a military objective—the "nature, location, purpose or use"[158] is the type of specific information that would constitute "detailed regulation" and not be part of customary international law. However, what is important about *Tadic* is not the minute details about what is and what is not part of customary law. What is important is that, even in internal conflicts where Protocol II does not apply, there is a body of law—customary international law—which requires the protection of civilians from attack. Therefore, regardless of the location of the civil war, the first component of distinction is legally binding.

B. The Second Component: Distinction as a Requirement to Appear Distinct in Battle

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[156] *Id.* art. 52(2).

[157] *See* Prosecutor v. Tadic, case no. IT-94-1-AR72, Appeal on Jurisdiction (Oct. 2, 1995), at para. 127, *reprinted at* 35 I.L.M. 32 (1996) (customary rules include protection of civilians from attack and protection of civilian objects).

[158] Protocol I, *supra* note 9, art. 52(2).

The second component of distinction is that combatants must make themselves appear distinct on the battlefield. The traditional method for making this distinction is through the wearing of uniforms; however, as early as 1907, the Hague Regulations allowed for a "fixed distinctive emblem recognizable at a distance."[159] Protocol I put the requirement for uniforms in Article 44: "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[160] Thus, combatants are required to wear uniforms while fighting. This aspect of distinction has important consequences both for the soldier and for the civilians.

For civilians in the area of the battle, distinction affords them the protection of not being accidentally targeted. The first component of distinction requires that civilians not be targeted; the second component provides a means for that to be effected. If combatants were not required to wear uniforms, and were permitted to wear civilian clothes, then there would be no way for the enemy to determine who were civilians and who were soldiers. With no

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[159] Hague Convention IV Respecting the Laws and Customs of War on Land, with Annexed Regulations, Oct. 18, 1907, art. 1, 36 Stat. 2227, 1 Bevans 631.

[160] Protocol I, *supra* note 9, art. 44(3). The entire text of the Article 44(3) reads:

> In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
> (a) during each military engagement, and
> (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
> Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1(c).

Id., art. 44(3).

way to visibly *distinguish* between combatants and non-combatants, there would be no way for enemy soldiers to comply with their obligation to *distinguish* between civilians and military objectives. Thus, without the requirement of a uniform, civilians would be at much greater risk because enemy soldiers could not identify legitimate targets.

The important consequence for soldiers is that, by wearing uniforms, they are complying with the law of war, so that if they are captured they are entitled to prisoner of war status.[161] This quid pro quo—the soldier is afforded a significant protection, but to earn it he must make himself an easier target—is an essential feature of humanitarian law.[162] Soldiers going into battle may be presumed not to want to die. They therefore would want to take any action that will make them less susceptible to being targeted. One easy way to avoid being targeted is to cast off his uniform and blend in with the civilian crowd—if he looks like a civilian he won't be targeted. However, to keep this from happening, international law provides a "carrot" for the soldier to distinguish himself—so long as he does, he is entitled to prisoner of war status.

The importance of the wearing of uniforms to the United States was highlighted in its treatment of Protocol I. Article 44, paragraph 3, requires the wearing of uniforms. However, it has a significant caveat—it allows for situations where "owing to the nature of the

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[161] *See infra* notes 167-171 and accompanying text.

[162] *International and Operational Law Note, Principle 2: Distinction*, ARMY LAW., Aug. 1988, at 35 ("What the judge advocate often does not appreciate is the 'quid pro quo' nature of this equation. It is international law that 'legalizes' the application of destructive force to such 'targets.' As a result, international law creates an 'immunity' for lawful combatants who commit such destructive acts directed as lawful targets. It is that same body of law, however, that mandates distinction between 'lawful' and 'unlawful' targets for preservation of the immunity that accompanies destroying lawful targets.").

hostilities" a combatant cannot distinguish himself, he is still considered a combatant if he carries his arms openly "during each military engagement"[163] and "while he is visible to the adversary while he is engaged in a military deployment preceding" an attack.[164] Allowing combatants to, in essence, pick and choose when they will distinguish themselves was not acceptable to the United States—Mr. Matheson described this as a "minimalist" standard of distinction. President Reagan, in refusing to submit Protocol I for the Senate's advice and consent, called the treaty "fundamentally and irreconcilably flawed," and cited as one of its flaws the "provision [that] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population."[165]

The United States' refusal to abide by Protocol I demonstrated the importance of distinction. Despite the fact that the United States has, as President Reagan noted, "traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict," she could not accept a treaty wherein the principle of distinction was so diminished. President Reagan's letter noted that the weaker definition of distinction would "endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."[166] Thus, despite potentially jeopardizing the United States' role as a

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[163] Protocol I, *supra* note 9, art. 44(3)(a).

[164] *Id.*, art. 44(3)(b).

[165] Reagan, President's Message to the Senate Transmitting the Protocol, 23 WEEKLY COMP. PRES. DOC. 91 (Jan. 29, 1987).

[166] *Id.*

world leader in humanitarian law by refusing to comply with Protocol I, President Reagan took the principled stand on behalf of the principle of distinction.

The principle of distinction is clearly a critical aspect of humanitarian law. Next, the concept of combatant immunity will be analyzed to see how it supports distinction.

C. Combatant Immunity and Distinction

If an average American citizen went to another country and started shooting people or bombing buildings, he would, of course, be subject to criminal prosecution by that state. In contrast, a soldier or airman killing or bombing in the line of duty in an international armed conflict cannot be prosecuted for his actions provided that they were in compliance with the law of war.[167] This ability to kill an enemy without criminal sanction results from combatant immunity or the combatants' privilege.[168] It dates back at least to 1563 and the writings of Pierino Belli.[169] It is a broad and important protection.[170] The importance of the privilege is

[167] Asbiorn Eide, *The New Humanitarian Law in Non-International Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 277, 287 (Antonio Cassese ed., 1979) ("The most salient feature of the system of prisoner of war protection is the prohibition of punishment solely on the grounds that a person has taken part in the hostilities, provided that the person in questions has behaved in accordance with the law of warfare.").

[168] Solf, *supra* note 72, at 58 ("In international armed conflict, prisoner of war status flows from the combatants' privilege. Those who are entitled to the juridical status of 'privileged combatants' are immune from criminal prosecution for those warlike acts that do not violate the law and customs of war but that might otherwise be common crimes under municipal law.")

[169] *Id. citing* P. BELLI, A TREATISE ON MILITARY MATTERS AND WARFARE at 62 (H. Nutting trans. 1563), *reprinted in* 18 THE CLASSICS OF INTERNATIONAL LAW 1 (J. Scott ed. 1950).

[170] Major Geoffrey S. Corn & Major Michael L. Smidt, *"To Be or Not to Be, That Is The Question" Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1, 8-16 (listing the protections afforded prisoners of war).

that it provides a strong incentive for soldiers to obey the laws of war—if soldiers understand that they will be held accountable for any law of war violations, then they will comport their behavior accordingly.[171] Particularly relevant to this paper is the soldier's incentive to comply with the principle of distinction.

Both of the components of distinction are served by combatant immunity. Combatants understanding that they will face prosecution for targeting civilians serve the first component, the requirement that combatants distinguish military objectives from civilians and civilian objects. Turning back to the hypothetical soldier who does not want to die, it can be presumed also that he also does not want to go to jail. If he is aware that failure to distinguish civilians can result in his prosecution—either by his own military or as a captive of the enemy—he will be fearful of such prosecution, and thereby more likely to comply with the distinction requirement.

The second component of distinction, that combatants must distinguish themselves on the battlefield, is similarly promoted by combatant immunity. The soldier who understands that he can avoid being prosecuted for his war-like acts if he wears a uniform is more likely to wear the uniform. The promise of combatant immunity is more important in the second component of distinction than in the first, for two reasons. First, as is discussed above, the soldier wants to live, and doing something that makes him an easier target seems counter-

[171] Doswald-Beck, *supra* note 22, at 46 (arguing that prosecution of violations of the law of war is a deterrent to further violations); *see* Lopez, *supra* note 66, at 934-35 ("[I]f the usual protections against prosecution for treason do not apply to the rebels, then the usual criminal responsibility for violation of the Conventions is also inapplicable. Rebels therefore must win at all costs in order to avoid prosecution by their government for treason; without the Geneva Conventions either to protect them or restrain them, there is no reason for victory-starved insurgents to defer to any of the Conventions' humanitarian provisions.").

intuitive. Thus, he must be forced—by the threat of prosecution—to make himself a target. Conversely, combatant immunity is less important for the first component because the soldier—a presumably moral person—is predisposed not to want to target civilians anyway. Thus, combatant immunity is a reinforcement to shore up the soldier's moral stance of not wanting to kill innocents.

Distinction is a critical aspect of humanitarian law. It provides protection for innocent civilians by ensuring that they are not intentionally targeted, and by ensuring that combatants distinguish themselves so enemy forces know whom to target. Combatant immunity is an important mechanism to ensure combatants comply with the principle of distinction. The next Part will analyze how the increase in both the destructiveness and the number of civil wars, combined with the state of flux in humanitarian law, lend themselves well to updating of the law of war by extending combatant immunity to rebels in civil wars, thus giving them an incentive to comply with the principle of distinction.

V. The Time is Right for Combatant Immunity in Internal Conflicts

Just as a number of factors must coalesce to give rise to a civil war,[172] so too must other factors coalesce before states will be willing to modify humanitarian law. And, where the change sought to be effected is application of combatant immunity to rebels—an area jealously guarded by states protecting their sovereignty and wanting to punish those who seek to overthrow them—the coalescence of these factors must be particularly compelling.

[172] *See supra* notes 29-37 and accompanying text.

Despite these seemingly daunting odds, the international community has come face to face with this coalescence: the unthinkable devastation visited on innocent civilians suffering through the ever-increasing number of civil wars has led to a situation where something must be done to protect them. As these civilians suffer, one solution suggests itself: offer an incentive for rebels to comply with humanitarian law, and particularly with the principle of distinction. Such an incentive is readily available, if the state will offer combatant immunity to the rebels if they comply with the law of war.

Why would a government give up the ability to prosecute rebels? As Mr. Lysaght put it, the "reality of life is that governments will agree to treat rebels as prisoners-of-war when and only when it is expedient to secure similar treatment for their own troops."[173] Thus, states are not going confer prisoner of war status on rebels out of an act of beneficence—there must be something in it for the state, a quid pro quo. However, a desire to secure prisoner of war status for its own soldiers should not be the only force sufficient to motivate states to grant combatant immunity. Instead, recognition of the practical benefits that flow to the state from giving combatant immunity to rebels should be sufficient to grant them that status. There are two practical advantages: protection of the civilian populace and ease of targeting rebels.

[173] Lysaght, *supra* note 60, at 21 ("Initially, before the meeting of government experts that preceded the Diplomatic Conference, there were hopes that prisoner-of-war status might be conferred on combatants in non-international armed conflicts. Few, if any, governments, however, were willing to sign away the right to punish those rebelling in arms against their authority. The reality of life is that governments will agree to treat rebels as prisoners-of-war when and only when it is expedient in order to secure similar treatment for their own troops.").

The principle of distinction saves civilian lives. If civilians are not intentionally targeted, as is too often the case now,[174] then the only harm that will come to them is through incidental injury. This can make a huge difference—in the Colombian civil war, one commentator estimated that more than two-thirds of the civilian casualties would not have occurred if the law of war had been complied with.[175] Thus, any action the state can take to promote distinction will protect civilian lives. By offering the "carrot" of prisoner of war status to rebels if they comply with the law of war, combatant immunity provides a strong incentive to comply.[176] Because of the incentive, with the consequent civilian lives that could be saved, states have a practical reason to confer combatant immunity status on rebels.

While the idea of saving the innocent lives of its citizens should have an obvious appeal to states, those fighting a serious civil war will be even more attracted to the practical ability to easily target rebels distinguishing themselves in combat. Without the benefit of combatant immunity, rebels have very little incentive to distinguish themselves. Without combatant immunity, rebels are subject to prosecution if they get caught, whether or not they distinguish themselves. From a rebel's perspective, then, it makes little sense to wear a uniform, which will only increase the chances of being captured or killed. Instead—again from the rebel's viewpoint—it makes far more sense to hide among the civilian populace. In

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[174] *See supra* note 42-46 and accompanying text.

[175] Carrillo-Suarez, *supra* note 20, at 8-9 ("The second issue raised by conventional wisdom relates to the interpretation and sufficiency of existing norms. Under this view, common article 3's provisions, and even those in Protocol II, are considered insufficient or deficient for the purpose of protecting the victims of internal wars, leading to an 'unsatisfactory state of affair' [citation omitted]. Yet if even just this 'minimum' were to respected by the parties to the Colombian conflict, more than two-thirds of all civilian deaths would be avoided!").

[176] *See* Doswald-Beck, supra note 22, at 46 (arguing that prosecution of violations of the law of war is a deterrent to further violations).

contrast, however, if rebels are given prisoner of war status if they do distinguish themselves, then there is a strong incentive to wear uniforms and comply with the laws of war. The practical benefit to the state—an identifiable target, vice one that is indistinguishable from the civilian masses—is hard to overstate, and well worth granting combatant immunity to rebels.

VI. Conclusion

As civil wars increase in number and intensity, and as the number of civilian casualties continues to escalate, the world faces a moral dilemma—something must be done to protect innocent civilian victims of civil war. One approach is to do nothing—to rely on the notion of sovereignty to keep international law out of internal conflicts. However, the better approach is to recognize the changing climate of international law, and to act now to protect civilians. That protection can be assisted by providing combatant immunity to rebels, thereby providing them with a strong incentive to comply with the principle of distinction.